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No. 759

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

JAMES H. MASON and ALTA MASON,
Appellants,

vs.

MIDWESTERN GAS TRANSMISSION COMPANY,
Appellee.

On Appeal From The Supreme Court
of the State of Illinois

MOTION OF APPELLEE TO DISMISS

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MOTION OF APPELLEE TO DISMISS

Pursuant to Rule 16(1) of the Revised Rules of this Court, appellee, Midwestern Gas Transmission Company, moves that the appeal be dismissed.

STATEMENT.

Appellants seek to appeal from a judgment of the Supreme Court of Illinois affirming a trial court's award of compensation in an eminent domain case in which appellee obtained certain easements for underground gas storage in land owned jointly by appellants. The sole issue before the court below was the propriety of the exclusion by the trial court of certain evidence appellants sought to introduce on the question of just compensation.

Appellee is engaged in the business of purchasing, transporting and selling natural gas in interstate commerce, and as such is a "natural-gas company" subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act §§ 1-2, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717-17a. (Abs. 12, 154.) In this connection, appellee is attempting to develop an underground gas storage reservoir in Edgar County, in east central Illinois. (Abs. 12, 155.)

The underground gas storage reservoir will be developed in subsurface formations which are shaped like a gentle dome. Gas will be injected from the surface into relatively porous limestone formations, which are directly beneath an impermeable shale formation. The shale cap rock is expected to prevent the horizontal and upward migration of the gas. This shale cap rock at its apex is more than 1,800 feet below the land surface. The storage dome underlies approximately 3,200 acres of land. (Abs. 21-26, 29-34, 11[illegible]13, 155.)

The Federal Power Commission has granted appellee a Certificate of Public Convenience and Necessity authoriz-

ing the development of this underground dome for the storage of natural gas. (Abs. 60.)

Appellants own a 107 acre tract overlying a portion of the dome. (Abs. 109, 156.) Appellee sought unsuccessfully to purchase from appellants easements in this tract for the construction and maintenance of a gas storage well and a road leading to the well site, and for the storage of natural gas in the above-specified geological formations. (Abs. 61-62, 155-58.) Appellee then instituted a proceeding, under the Illinois Gas Storage Act, ILL. REV. STAT., ch. 104, §§ 104-12 (1963), before the Illinois Commerce Commission seeking authorization to bring an action under the Illinois Eminent Domain Act, ILL. REV. STAT., ch. 47, §§ 1-17 (1963), to acquire such easements. (Abs. 9-10.)

Under section 3 of the Illinois Gas Storage Act, appellee was required to publish notice of the proceeding before the Illinois Commerce Commission and to send notice by registered mail to appellants, at least 21 days prior to the hearing. ILL. REV. STAT., ch. 104, § 106 (1963). Appellee complied with such notice requirements (Abs. 12-14), and Mr. James H. Mason, one of appellants, participated in the hearings before the Illinois Commerce Commission (Abs. 11).

Upon the conclusion of the hearings, the Illinois Commerce Commission issued an order authorizing appellee to acquire, by eminent domain, the easements necessary for this gas storage project. (Abs. 9-47.) Under section 5 of the Illinois Gas Storage Act, appellants had the right to appeal to the courts from the Commission's order by bringing a civil action "to test the lawfulness and reasonableness" of the order. ILL. REV. STAT., ch. 104, § 108 (1963). Appellants did not exercise this right, and no such action was brought.

Appellee then brought the present action in the Circuit Court of Edgar County, Illinois, under the Illinois Eminent Domain Act, ILL. REV. STAT., ch. 47, §§ 1-17 (1963), which is the general eminent domain statute in Illinois utilized by governmental bodies and public service corporations alike. (Abs. 1-2.)

At the trial, evidence was introduced showing that appellants' land was used as pasture, as a homesite, and for the production of oil. (Abs. 109.)

Appellee and appellants introduced evidence on the present fair cash market value of appellants' land, the fair cash market value of the land after the easements sought by appellee had been impressed upon the fee, and the fair cash market value of the easements for the well site and access road. (Abs. 114, 121, 127-28, 136, 137.) The evidence showed that the underground formations in which appellee sought gas storage easements had no value. (Abs. 114, 121.)

The evidence also showed, and appellants admitted, that the underground gas storage project would not affect the oil production from this land, since the oil is produced from formations above the cap rock of the storage project. (Abs. 137; Add. Abs. 3.) Appellee entered into a binding stipulation that appellants would not be restricted in the use of their property above and below the specific geological formations which make up the gas storage project, that appellee would pay for any additional drilling cost to appellants caused by appellee's gas storage operations, and that appellants would retain title to all native hydrocarbon substances in the storage structure. (Abs. 67b-68, 158-59.)

Appellants attempted to introduce evidence for the express purpose of showing the value of the entire gas storage dome and the value of their land as part of that dome. (Abs. 68-69, 128.) The trial court sustained appellee's objection to this evidence on the basis of the decision of the Supreme Court of Illinois in *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill. 2d 520, 182 N.E.2d 169 (1962), *appeal dismissed & cert. denied*, 371 U.S. 185 (1963), holding evidence of this type to be "too remote and speculative." (Abs. 69, 128.)

The jury returned a verdict making the following award to appellants (Abs. 59, 137-38):

> Just compensation for the 0.115 acres for the permanent well site is $50.00.
>
> Just compensation for the depreciation in value of the 0.108 acres for the permanent easement for the access road is $21.60.
>
> Just compensation for the depreciation in value of the 1.894 acres for the easement for the temporary well site is $60.00.
>
> Just compensation for the depreciation in value of the shale and limestone strata for the permanent easement for the underground storage of natural gas is no dollars.
>
> Just compensation for the damage to the remaining land of appellants, exclusive of the easements taken, is $5,741.14.

Thus, the jury awarded appellants a total of $5,872.74, of which $5,741.14 was compensation for the depreciation in the value of appellants' land because of the granting of the easements for underground gas storage and related facilities. The trial court entered judgment granting this compensation to appellants and the easements to appellee. (Abs. 138, 149-64.)

Appellants appealed to the Supreme Court of Illinois, which found that the "proof established the highest and best use of the property to be for a suburban home site, stock farming and oil production"; that the evidence offered by appellants to establish the value of this property as part of an underground gas storage reservoir was "too remote and speculative" and therefore was properly excluded by the trial court; and that the jury verdict "was within the range of the testimony and was not clearly and palpably wrong." The Supreme Court of Illinois, on the basis of these findings and its 1962 decision in the *Buckles* case, affirmed the judgment of the trial court. 31 Ill. 2d 340, 342-43, 201 N.E. 2d 379, 381 (J.S. 23-24).

ARGUMENT.

The questions which appellants urge before this Court are simply not involved in this case. Central to all three questions raised by appellants (J.S. 3) is the assumption that the court below held that appellee could store gas under appellants' land without payment of compensation because appellee had secured exclusive authority from the State of Illinois, under the Illinois Gas Storage Act, to develop this underground gas storage reservoir. The court below made no such holding.

Appellants were awarded $5,741.14 for the depreciation in the value of their land for residential, farm and mineral purposes caused by the grant to appellee of easements for the storage of gas and the related well and road facilities. (Abs. 59, 138.)

Appellants were not permitted to introduce evidence of the value of the underground gas storage reservoir on the ground that such evidence was too remote and specu-

lative. (Abs. 69, 128.) This action was taken by the trial court and affirmed by the court below on the basis of the latter's decision in *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill. 2d 520, 182 N.E.2d 169 (1962), *appeal dismissed & cert. denied*, 371 U.S. 185 (1963), which in turn was based on decisions of this Court that a use of property which is possible only upon the combination of that property with the property of others must be considered in determining the value of that property only when such combination has been shown to be a reasonable probability. (Abs. 69, 128); 31 Ill. 2d 340, 342-43, 201 N.E.2d 379, 381 (J.S. 23). In *Buckles*, as additional reasons for holding the evidence there excluded to be too remote and speculative, the court pointed to the untested feasibility of the dome as a gas storage reservoir and to the unlikelihood that the Illinois Commerce Commission, having already issued a Certificate of Public Convenience and Necessity to one utility to develop the dome, would issue a second certificate to any of the alternative developers to which the landowner there alluded. 24 Ill. 2d 520, 538-39, 182 N.E. 2d 169, 179.

The actual decision of the court below, as opposed to that fictitiously imputed to the court by appellants, is not reviewable by appeal nor worthy of review by writ of certiorari.

1. *Appeal is improvidently sought.* Appellants seem to believe (J.S. 2, 3) that this Court has jurisdiction to review the decision below on the ground that the validity of the Illinois Gas Storage Act was "drawn in question" within the meaning of 28 U.S.C. § 1257(2). That provision authorizes review by this Court by appeal, as opposed to writ of certiorari, "where is drawn in question the validity of a statute

of any state on the ground of its being repugnant to the Constitution . . . , and the decision is in favor of its validity."

The Illinois Gas Storage Act establishes a procedure by which public service corporations can obtain the power of eminent domain. ILL. REV. STAT., ch. 104, §§ 104-05 (1963). The power of eminent domain once so obtained must be exercised under the Illinois Eminent Domain Act, ILL. REV. STAT., ch. 47, §§ 1-17 (1963). The instant case is under the Eminent Domain Act, not the Gas Storage Act.

The only decision properly attributable to the court below is that evidence of the value of appellants' land as part of an underground gas storage reservoir was inadmissible because there was no reasonable possibility that appellants' land could be combined with the land of others to form the necessary storage dome. 31 Ill. 2d 340, 342-43, 201 N.E.2d 379, 381 (J.S. 23-24). If such a decision can be said to involve any statute, which in itself is a startling proposition for which appellants cite no authority, that statute would have to be the Illinois Eminent Domain Act under which the present case was brought. Appellants, however, have never contended, here or below, that the Eminent Domain Act, as distinguished from the Gas Storage Act, has been drawn in question.

Appellants argue (J.S. 15-16) that the court below by its favorable citation of the *Buckles* decision applied in this case the analysis advanced in *Buckles* that use of the land in question as part of an underground gas storage reservoir was too remote and speculative for the additional reason that it was unlikely the Illinois Commerce Commission, having already issued a Certificate of Public Convenience and Necessity to one utility to develop

the dome, would issue a second certificate to any of the other utilities to which the landowner there alluded, 24 Ill. 2d 520, 538, 182 N.E.2d 169, 179.

Whether or not this analysis in *Buckles* turned on the fact that the outstanding certificate had been issued by the Illinois Commerce Commission, which fact was not present in the instant case, this analysis, if it involves any statute, involves the certificating statute, not the Illinois Gas Storage Act. Before any utility subject to the Illinois Public Utilities Act can acquire and operate a facility such as the present storage project, it is required by that statute to secure a Certificate of Public Convenience and Necessity from the Illinois Commerce Commission. ILL. REV. STAT., ch. 111⅔, § 56 (1963). Interstate pipeline companies such as appellee, although not subject to this state requirement, *Wilcox v. Illinois Commerce Comm'n*, 23 Ill. 2d 432, 178 N.E.2d 873 (1962), are required by the Natural Gas Act to obtain a similar certificate from the Federal Power Commission. § 7(c), 52 Stat. 824 (1938), as amended, 15 U.S.C. § 717f(c). Appellants have never contended that the Illinois Public Utilities Act or its federal counterpart the Natural Gas Act has been drawn in question by the decision below.

Moreover, whatever statute may be involved in the "unlikelihood of a second certificate being granted" analysis of *Buckles*, that statute cannot be said to have been drawn in question by the decision in *Buckles* inasmuch as that analysis was merely a cumulative ground for the holding in that case that the proffered evidence of value was too remote and speculative, 24 Ill. 2d 520, 534-40, 182 N.E. 2d 169, 177-80, which holding was, as shown below, supported by an unrelated, independent and adequate ground.

Cf., e.g., Lynch v. New York ex rel. Pierson, 293 U.S 52 (1934).

In short, any conceivable statute which could have been involved in the decision below has not been and is not being challenged by appellants. The only statute they challenge, *i.e.*, the Illinois Gas Storage Act, not only was not involved in this case but could not be challenged in this case. The proper place to challenge the Illinois Gas Storage Act was in the proceeding under that Act which preceded the instant case. Appellants were given notice of that proceeding; one of appellants participated in that proceeding; and, at the time of that proceeding, the decision in the *Buckles* case had already been handed down by the Supreme Court of Illinois. Yet, appellants made no attempt in that proceeding to raise the defects which they now claim to see in the Illinois Gas Storage Act nor did they exercise their rights expressly granted by that Act to bring a court action to test the lawfulness of the Commission's order. ILL. REV. STAT., ch. 104, § 108 (1963). As pointed out in the *Buckles* case, appellants "cannot now collaterally attack the order" of the Illinois Commerce Commission granting the power of eminent domain. 24 Ill. 2d. 520, 528, 182 N.E.2d 169, 174.

Even if the Illinois Gas Storage Act could be said to have been drawn in question by the decision below, the question thus presented is not the substantial federal question which must be presented to appeal to this Court. *Zucht* v. *King*, 260 U.S. 174, 176, 177 (1922). The decisions of this Court clearly authorize the exclusion of evidence of the value of appellants' land as part of an underground gas storage reservoir for the reason that the combination of their land with the land of others to form the necessary

underground dome was not a reasonable possibility.[1] In *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 275-76 (1943), this Court explained:

> "An owner of lands sought to be condemned is entitled to their 'market value fairly determined.' *United States* v. *Miller*, 317 U.S. 369, 374. That value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted. *Boom Co.* v. *Patterson*, 98 U.S. 403; *McCandless* v. *United States*, 298 U.S. 342. In that connection the value may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract. *McGovern* v. *New York*, 229 U.S. 363. But in order for that special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future. *Olson* v. *United States*, 292 U.S. 246, 255. In absence of such a showing, the chance of their being united for that special use is regarded 'as too remote and speculative to have any legitimate effect upon the valuation.' *McGovern* v. *New York, supra*, p. 372."

There has been no contention or showing that the circumstances of the instant case are significantly different than those present in the above-quoted decision and the cases therein cited. Here, appellants owned less than 4% of the minimum area necessary to form the gas storage reservoir. Moreover, even if the court below was factually mistaken on the reasonableness of the possibility of combining the parcels necessary to form the storage reservoir, such a debatable misapplication of an accepted formula

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[1] As discussed above, it is not necessary to consider the validity of the additional grounds suggested in *Buckles* in support of the exclusion of such evidence inasmuch as those grounds were cumulative grounds for the conclusion that the evidence was too remote and speculative.

does not raise a substantial federal question. *Cf., e.g., McGovern v. City of New York*, 229 U.S. 363, 370-72 (1913); *Roberts v. New York City*, 295 U.S. 264, 277-78 (1935).

2. *The questions presented do not warrant review by certiorari.* As discussed above, the decision below is in accord with the decisions of this Court. The most that appellants can say is that the court below incorrectly applied well-defined principles to the particular facts presented here. This Court has already refused to review the *Buckles* decision which contains the analysis which appellants believe aggrieves them and which they attempt to incorporate into this case on the strength of the favorable citation of the *Buckles* case by the court below. *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill. 2d 520, 182 N.E.2d 169 (1962), *appeal dismissed & cert. denied*, 371 U.S. 185 (1963).

Nor is the decision below in conflict on the requirements of the federal Constitution with the decisions of the courts of the states of Kentucky and West Virginia as suggested by appellants. Neither *Milby* v. *Louisville Gas & Elec. Co.*, 375 S.W.2d 237 (Ky. 1964), nor *United Fuel Gas Co.* v. *Allen*, 137 W. Va. 897, 75 S.E.2d 88 (1953), purport in any way to be based upon the requirements of the federal Constitution or the decisions of this Court interpreting those requirements. Thus, even if there were a conflict, which there does not appear to be,[2] between the ruling of the

[2] The evidence admitted in the Kentucky and West Virginia cases concerned the nominal rentals being paid for comparable underground storage rights in the area and was offered by the condemnors themselves *for the purpose* of showing the actual market value of underground storage rights. The evidence excluded in the instant case concerned primarily the value of an underground gas storage reservoir and was offered by appellants *for the purpose* of constructing a value for underground storage rights. (Abs. 68-108.)

court below and those of the Kentucky and West Virginia courts on the admissibility of certain evidence, such a variance in views would not mean that these courts are placing different interpretations on the federal Constitution. *Cf. Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

CONCLUSION.

The appeal should be dismissed because the decision below did not draw in question the validity of the Illinois Gas Storage Act, nor does it present a substantial federal question. If the appeal is treated as a petition for writ of certiorari, the decision below, involving the application of well-defined principles to the particular facts of this case, is not in conflict, insofar as the Constitution is concerned, with the decisions of this Court or any other court.

Respectfully submitted,

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